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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-850

AHARON RON,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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November 26, 1973

TABLE OF CONTENTS

PAGE

Opinion Below 1

Jurisdiction 1

Question Presented 2

Constitutional Provisions Involved 2

Statement of the Case 2

Reasons for Granting Writ 9

CONCLUSION 14

Appendix — Order of Affirmance of The United States Court of Appeals 1a

TABLE OF CASES

Costello v. United States, 350 U.S. 359 (1956) 9

Dennis v. *United States*, 384 U.S. 855 (1966) 12

United States v. *Estepa*, 471 F.2d 1132 (1972) 10

United States v. *Arcuri*, 405 F.2d 691 (1968), cert. denied, 395 U.S. 913 (1969) 10

United States v. *Borelli*, 336 F.2d 376 (1964), cert. denied sub nom. *Mogavero* v. *United States* 379 U.S. 960 (1965) 10

United States v. *Umans*, 368 F.2d 725 (1966), cert. dismissed as improvidently granted, 389 U.S. 80 (1967) 10

United States v. *Payton*, 363 F.2d 996, cert. denied, 385 U.S. 993 (1966) 10

United States v. *Beltram*, 388 F.2d 449 (1967), cert. denied sub nom. *Malofsky* v. *United States* 390 U.S. 1017 (1968) 10

PAGE

Statutes and Rules

28 U.S.C. § 1254(1) 1
18 U.S.C. § 3231 1
18 U.S.C. § 1343 2
18 U.S.C. § 1341 3
18 U.S.C. § 2314 3
18 U.S.C. § 371 3
18 U.S.C. § 3500(e)(3) 12

U.S. CONSTITUTION

Fifth Amendment 2
Sixth Amendment 2

Other Authorities

Potter, Historical Introduction to English Law and its Institutions, pp. 213-214 (2nd Ed., 1943) 9
Somers, A Guide to the Knowledge of the Rights and Privileges of Englishmen, pp. 150-160 (1757) ... 9
Kaufman, The Grand Jury—Its Role and Its Powers, 17 FRD 331, 333-334 (1955) 9
1 Holdsworth, A History of English Law, 322 (4th Ed., 1927) 9
Note, 43 N.Y.U.L. Rev. 578, 581, et seq. (May 1968) 13
Knudsen, Pre-Trial Discovery of Federal Grand Jury Testimony, 48 Wash. L.Rev. 423 (1972) ... 13

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Aharon Ron, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this proceeding on October 31, 1973, (*infra*, pp. 1a-2a), affirming the judgment of the United States District Court for the Southern District of New York, entered on April 23, 1973.

Opinion Below

No opinion was rendered in this proceeding by either the Court of Appeals or the District Court.

Jurisdiction

The judgment of the Court of Appeals was entered on October 31, 1973. This petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The District Court's jurisdiction was invoked under 18 U.S.C. § 3231.

Question Presented

Is the indictment of a grand jury constitutionally valid and sufficient which is based upon a written memorandum prepared by an F.B.I. agent from notes taken at interviews with the Government's chief witness, where the witness himself appears before the grand jury, but is excused at the request of the Government attorney after testifying that the memorandum contains a fair and accurate summary of his knowledge of its subject matter?

Constitutional Provisions Involved

United States Constitution, Fifth Amendment:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ."

United States Constitution, Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

Statement of the Case

On February 24, 1972, petitioner Aharon Ron and five others—Collin Garner, Frederick Lee, William Champion, Louis Beck and Emanuel Lieberman (better known as "Mannie Lester")—were charged under an indictment with four counts of wire fraud (18 U.S.C. § 1343), one count of

mail fraud (18 U.S.C. § 1341), one count of transporting goods as part of a scheme to defraud (18 U.S.C. § 2314), and one count of conspiring to commit the foregoing offenses (18 U.S.C. 371).

On April 23, 1973, after trial, petitioner was convicted on all counts of the indictment except, inexplicably, the fourth count of wire fraud, sentenced to prison for two consecutive terms of five years, and fined $5,000.

Garner and Lee were convicted only on the conspiracy count, and were given substantially lighter sentences. Champion was acquitted on all counts except that for conspiracy, on which, in his case, the jury failed to arrive at an agreement. In Beck's case, the jury could not reach agreement on any count. At the time of the trial, Lester was serving a jail sentence in Canada.

Both in the grand jury proceeding and at the trial, the Government's case rested upon certain critical facts to which only one Joseph Hagins was prepared to testify. Hagins, a self-confessed confidence man, claimed to have been a key member of the conspiracy alleged in the indictment, although he was not named as a defendant therein. It is the crux of the present petition that Hagins appeared in person before the grand jury, but, thanks to the procedure followed by the Government attorney, managed to avoid telling any part of his story to that body.

Specifically, in his appearance before the grand jury, Hagins was asked by the Government attorney to do no more than to identify a memorandum prepared by an F.B.I. agent from notes taken at interviews with the witness, to state that he had read the memorandum before coming into the grand jury room, and to answer in the affirmative when

asked if it contained "a fair and accurate summary of the knowledge you have concerning the activities it discusses." Immediately thereafter, at the request of the Government attorney, Hagins was excused by the foreman, and the F.B.I. agent's memorandum was read by the Government attorney to the grand jury.

Because a substantial amount of live testimony given by other witnesses in this case who had appeared before a prior grand jury was also read by the Government attorney to the indicting grand jury, that attorney advised the latter body that "it was their prerogative to hear . . . in person the witnesses whose prior testimony had been read to them. . . ."

As it appeared in the F.B.I. agent's memorandum and as it was told in greater detail by the witness himself at the trial, Hagins' story tended to prove that he had acted as an intermediary in the conspiracy alleged in the indictment between two separate and distinct groups among the conspirators who had otherwise no contact with, or even knowledge of, each other. According to Hagins' story, one group, consisting of Garner, Lee and Champion, had arranged the theft of the securities involved in the conspiracy, after which the other group—Beck, Lester and petitioner Ron—had arranged the sale of a portion of the securities, and of the first group only Garner had met with any member of the second, and he had met only with Lester when Hagins had brought them together. The lack of contact between the two groups is critical because Beck, who was not convicted, as well as petitioner, while admitting participation in the sale of a portion of the securities, denied any knowledge that they had been stolen.

According to Hagins, in October 1969, in New York City, he had arranged through Garner, whom he had just

met for some other illicit purpose, to introduce him to Lee and Champion, who were then employees of the stock brokerage firm of Goodbody and Company, and Hagins had thereupon persuaded Lee and Champion to make available to Lester, who was presumably well known to Hagins, some $850,000 worth of stolen Leasco Data Systems Corporation warrants and a Goodbody tax stamp with which to effectuate the sale of the warrants, on the premise that Lester would in relatively short order pay them 50% of the face value of the warrants.

It was when Hagins' story centered on petitioner Ron that the version in the F.B.I. agent's memorandum, which was read to the grand jury and led to petitioner's indictment, differed most dramatically from the version in Hagins' own testimony at the trial. In both versions, Hagins is either reported as asserting, or he actually asserted, that after the delivery of the Leasco warrants to Lester, when Hagins was pressing Lester for money for Garner, Lee, Champion and himself, Lester had described petitioner to Hagins as Lester's financial backer; that Lester had thereupon given Hagins a check made by petitioner to Hagins' order for $5,000; that petitioner had thereafter given Hagins two or three more checks, although only one of them was for as large an amount as the first; that petitioner had indicated to Hagins knowledge of the negotiations for the sale of the warrants and petitioner's expectation that Lester would invest his share of the proceeds in ventures in which petitioner was interested; and, lastly, that petitioner had introduced Hagins to Beck, and had told Hagins that he could speak freely to Beck.

In the F.B.I. agent's memorandum, however, Hagins is described as stating that when petitioner had discussed with him the negotiations for the sale of the Leasco war-

rants, petitioner had asked if the warrants had been stolen, and Hagins had answered affirmatively. In Hagins' testimony at the trial, the witness said nothing of the sort.

Moreover, in the F.B.I. agent's memorandum, Hagins is quoted to the effect that "he also realized that Beck had to know the securities were stolen." Since, in his testimony at the trial, Hagins would not have been permitted to express any such opinion, he was not even asked to do so.

As indicated above, Hagins' story contained the critical allegations of fact on which, in both the grand jury proceeding and at the trial, the Government's case against petitioner Ron rested. (The same is true of the Government's case against Garner, Lee, Champion and Beck, particularly the first three named defendants, who concededly had nothing to do with the sale of a portion of the Leasco warrants and who, except for Hagins' story, were not connected in any way with the theft of the warrants.) The other evidence showed merely that petitioner had introduced Beck, whom he had previously known, to Lester, whom he had also previously known, without reference to the Leasco warrants, that Beck, an attorney, had thereafter learned directly from Lester of the existence of the warrants, and had also arranged directly with Lester for the sale of approximately $300,000 worth of the warrants and the delivery of the proceeds of the sale.

Indeed, when Beck arranged the sale, which he in turn effected through the agency of the Rawson Trust Company, located in the Bahamas, he was required by Rawson to sell for his own account rather than for the account of one Michael C. Van Beuren, for whom, at Lester's directions, he had asked Rawson to act. After Rawson had effected the sale, through the well-known stock brokerage firm of Hayden, Stone & Company in New York City, Beck

also arranged for the transfer of the proceeds from the account maintained by Rawson in the Chase Manhattan Bank in New York City to an account in the name of Van Beuren in a branch of the Bank of Montreal in Toronto, Canada.

(Throughout this case, the Government appears to have taken the position that Michael C. Van Beuren was merely a name that Lester had adopted, but one of the Government's most impeccable witnesses, a constable of the Canadian Mounted Police, testified that a man by that name was known to him and was a respectable Canadian citizen. As indicated above, Beck testified that Lester had told him that Lester was acting for Van Beuren and other Canadians in the sale of the Leasco warrants.

(It should also be noted at this point that the first five counts of wire and mail fraud contained in the indictment have their origin in the fact that, in the course of arranging for the sale with Rawson, Beck had sent and received four wires and one letter. The sixth count, for transporting goods as part of a scheme to defraud, derives from the fact that, after Beck had arranged for the transfer of the proceeds of the sale to the account of Van Beuren in the Bank of Montreal in Toronto, Lester had the bank send to New York City drafts drawn to the order of Van Beuren on the bank's New York agency.)

The only evidence relative to petitioner Ron, outside of Hagins' story, which is at all suspect has to do with a single incident occurring on November 12, 1969, after the Bank of Montreal had sent the aforementioned drafts to Lester. On that occasion, Beck, accompanied by petitioner and Lester, persuaded an officer of a branch of the Franklin National Bank in New York City to give Lester, posing as Van Beuren, cash in return for a $10,000 bank draft

to the order of Van Beuren drawn on the Bank of Montreal's New York agency. At the same time, Lester, still posing as Van Beuren, endorsed over to petitioner two other $10,000 bank drafts of the same tenor, and petitioner thereupon opened an account with the Franklin National Bank with one of the drafts.

On the same day, Lester flew to Toronto, where upon arrival he was arrested by the Canadian police, who had apparently been investigating his activities for some time, and thereafter Garner, Lee, Champion, Beck and petitioner were charged under the indictment in this case.

The failure of Beck or petitioner to disclose to the officer of the Franklin National Bank on November 12, 1969, that Lester was not Van Beuren is hardly as suspect as it might at first appear, when seen in the light of Beck's testimony that Lester had told him that Lester was acting for Van Beuren, and Beck's further testimony, verified by the officer of the bank, that, on the very next morning, Beck had told the officer that Lester was not Van Beuren. In any event, the incident of November 12, 1969 hardly constitutes evidence that Beck or petitioner knew that the Leasco warrants had been stolen.

Petitioner's acceptance of $20,000 from Lester is not even suspect. The evidence was ample that petitioner, who considers himself, and is considered by others, to be a rabbi, was in November 1969 and prior thereto, actively engaged in raising funds for a school in his native land of Israel from a host of individuals in this country, including many public officials and other prominent citizens who held him in high esteem. For example, petitioner had previously received substantial gifts for the school in Israel from Beck, who is a former Treasurer of the Democratic Party of the State of New York.

It seems fair to say, therefore, that without Hagins' story the Government would not even have presented this case to the grand jury.

Reasons for Granting Writ

THE PROCEDURE FOLLOWED BY THE GOVERNMENT IN THE SUBMISSION OF HAGINS' STORY TO THE GRAND JURY EFFECTIVELY DEPRIVED PETITIONER OF HIS RIGHT TO AN INDICTMENT THAT REPRESENTED THE CONSCIOUS CHOICE OF THAT BODY AND TO ANY POSSIBILITY OF DISCOVERY BEFORE OR AT TRIAL OF THE TESTIMONY OF THE GOVERNMENT'S CHIEF WITNESS AGAINST HIM.

There can be no question that the grand jury system was devised in England and developed there and here as a shield for the accused, in order to protect him against the many adverse consequences of a criminal prosecution, even one resulting in an acquittal, that might otherwise have been brought against him at the whim or caprice of King, President or lesser governmental authority. Potter, Historical Introduction to English Law and its Institutions, pp. 213-214 (2nd Ed., 1943); Somers, A Guide to the Knowledge of the Rights and Privileges of Englishmen, pp. 150-160 (1757); 1 Holdsworth, A History of English Law, 322 (4th Ed., 1927); Kaufman, The Grand Jury—its Role and its Powers, 17 FRD 331, 333-334 (1955).

That does not mean that a grand jury should be hampered in its work by technical rules or prevented from handing down an indictment upon any evidence that it deems satisfactory, including hearsay, if it deems hearsay satisfactory. Cf. *Costello* v. *United States*, 350 U.S. 359 (1956).

It would seem to imply, however, that a grand jury must make a conscious choice in arriving at its determination, and not be induced to do so by deceit. Specifically, it should know or be told when it is receiving hearsay rather than evidence consisting of the personal knowledge and recollection of an eye-witness, and it should certainly not be misled into believing that hearsay is such evidence.

Petitioner assumes that this initial proposition is axiomatic, implicit in the decision and opinion of this Court in *Costello*, and requires not the slightest modification of that decision or opinion. It has also recently found expression in a line of cases decided by the Court of Appeals to which petitioner now seeks to have a writ of certiorari issue. *United States* v. *Estepa*, 471 F.2d 1132; (1972); *United States* v. *Arcuri*, 405 F.2d 691 (1968), cert. denied, 395 U.S. 913 (1969); *United States* v. *Borelli*, 336 F.2d 376 (1964), cert. denied sub nom. *Mogavero* v. *United States*, 379 U.S. 960 (1965); *United States* v. *Umans*, 368 F.2d 725 (1966), cert. dismissed as improvidently granted, 389 U.S. 80 (1967); see also dissent of Friendly, *J.*, in *United States* v. *Payton*, 363 F.2d 996, 999, cert. denied, 385 U.S. 993 (1966), and dissent of Medina, *J.* in *United States* v. *Beltram*, 388 F.2d 449, 451 (1967), cert. denied sub nom. *Malofsky* v. *United States*, 390 U.S. 1017 (1968).

In *Estepa*, the most recently decided case among those cited immediately above, the Court of Appeals reversed a conviction and dismissed the underlying indictment for the reason that in the grand jury proceeding the Government had presented the salient facts of its case through a police officer who did not have personal knowledge of those facts, without advising the jury of the hearsay nature of its witness' testimony. In the words of the Circuit Court—

> ". . . even though '[t]here is no affirmative duty to tell the grand jury *in haec verba* that it is listen-

> ing to hearsay,' United States v. Malofsky, 388 F.2d 288, 289 (2 Cir.), cert. denied, 390 U.S. 1017, 88 S.Ct. 1273, 20 L.Ed.2d 168 (1968), the grand jury must not be 'misled into thinking it is getting eyewitness testimony from the agent whereas it is actually being given an account whose hearsay nature is concealed. . . .' United States v. Leibowitz, 240 F.2d 39, 42 (2 Cir. 1969). That was what happened here" (471 F.2d 1132, 1136).

That, petitioner respectfully submits, was also what happened in the present case, to an even greater degree. Here, the Government actively misled the grand jury concerning the hearsay nature of the F.B.I. agent's memorandum by reading the memorandum to the grand jury after placing Hagins on the stand and having him identify and "adopt" the memorandum.

It cannot be reasonably argued that the memorandum, standing alone, was anything other than hearsay, and in the Court below no such argument was made. Below, however, it was argued that the memorandum, when "adopted" by Hagins, somehow became the equivalent of primary source evidence. Any such argument is easily demonstrated to be nonsense: if true, it would have enabled the Government to follow the same procedure at the trial in this case (and in other cases, for that matter), which, of course it did not even try to do, and would not have been allowed to do had it tried.

The argument made below by the Government does, nevertheless, serve an important purpose. It precludes the Government from arguing to this Court with any force that the Government did not mislead the grand jury into believing that the F.B.I. agent's memorandum, when adopted by Hagins, was the equivalent of the latter's live testimony,

since, if the Government's trained attorneys entertained that belief, the untutored grand jurors cannot reasonably be assumed to have thought otherwise.

The accompanying advice given by the Government attorney to the grand jury merely compounded the original error. To be sure, it was the prerogative of the grand jurors to hear in person any witness "whose prior testimony had been read to them." But had they not heard Hagins in person before the F.B.I. agent's memorandum was read to them? More importantly, were they not to infer that the memorandum was "prior testimony," which, of course, it was not?

As indicated above, the procedure followed by the Government in this case also effectively deprived petitioner of his full right to a fair trial, by preventing him from obtaining discovery before or at trial of the testimony of the Government's chief witness against him. That aspect of the matter, it should be noted, was not given any consideration in *Costello* because in 1956, when that case was decided by this Court, a criminal defendant did not enjoy the opportunities for discovery he has since been afforded both by subsequent decision of this Court and by act of Congress. Cf. *Dennis* v. *United States*, 384 U.S. 855 (1966), and the Jencks Act, as amended by the Organized Crime Control Act of 1970 (18 U.S.C. § 3500(e)(3)).

It has been suggested in the prior decisions of the Court of Appeals for the Second Circuit cited above and in recent commentaries that the procedure followed by the Government in those cases may have been deliberately intended to deprive the defendant of his opportunities for discovery, and, specifically, to deprive him of the means to impeach a key Government witness by pointing out inconsistencies between the witness' testimony before the grand jury and

the witness' testimony at trial. (See cases cited *supra*, p. 10; also, Note, 43 N.Y.U.L. Rev. 578, 581 et seq. (May 1968); Knudsen, Pre-Trial Discovery of Federal Grand Jury Testimony, 48 Wa sh. L.Rev. 423 (1972).

In *Estepa*, the Court of Appeals indicated that one ground for its decision to reverse the conviction and dismiss the indictment therein was the meagre excuse offered by the Government for failing to bring its eye-witness before the grand jury (471 F.2d 1132, 1134). In the present case, the Government actually brought its eye-witness before the grand jury, only to lead him away without giving the grand jury the benefit of hearing his story in his own words and based on his own personal knowledge and recollection. Here, therefore, there was no excuse whatsoever for the conduct of the Government and no reason for it except to shield Hagins against subsequent impeachment and thereby to deprive petitioner and his co-defendants of a valuable pre-trial and trial device.

Petitioner respectively submits that the time has come for this Court to review the broad rule laid down in *Costello* in the light of the developments in the law of discovery in criminal cases since 1956, and to refine that rule to the limited extent necessary to prohibit the Government from misusing it to deprive a defendant in any such case of his opportunities for discovery. At this point, petitioner respectfully suggests, the Court need not go beyond the facts of this case, nor do more than to proscribe the procedure followed by the Government herein, in which a key witness is brought before a grand jury merely to identify and "adopt" a memorandum prepared by a Government agent, even though the witness' entire live testimony relative to the facts of the case within his personal knowledge and recollection would neither be extensive nor complicated.

Any such modification or refinement of the rule in *Costello* will hardly affect the grand jury system in this country adversely, if at all. It will, however, insure a defendant in a criminal case of his full right to a fair trial.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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STANLEY GELLER
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400 Madison Avenue
New York, New York 10017

Dated, New York, New York
November 26, 1973

Appendix—Order of Affirmance of The United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

Corrected Copy

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of October one thousand nine hundred and seventy-three.

Present:

HON. LEONARD P. MOORE
HON. PAUL R. HAYS
HON. WILFRED FEINBERG

Circuit Judges,

UNITED STATES,

Plaintiff-Appellee,

—against—

LOUIS BECK, WILLIAM CHAMPION, COLLIN GARNER, FREDERICK LEE, EMANUEL LIEBERMAN a/k/a, MANNIE LESTER, and AHARON RON,

Defendants,

AHARON RON, COLLIN GARNER, FREDERICK LEE,

Defendant-Appellants.

73-1553
73-1658
73-2119

Order of Affirmance of The United States Court of Appeals

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk

By: Vincent A. Carlin
Chief Deputy Clerk